No. 2500.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation,

Appellant,

vs.

CAPAY DITCH COMPANY, a Corporation, YOLO COUNTY CONSOLIDATED WATER COMPANY, a Corporation, J. M. ADAMSON, L. D. STEPHENS and JOSEPH CRAIG,

Appellees.

BRIEF OF APPELLANT.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff and Appellant.

HARDING & MONROE,
Of Counsel.

Filed this.....day of March, 1915.

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BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an appeal from a decree dismissing appellant's bill for want of jurisdiction.

(a) *Allegations of which the Court below took note.*—The allegations of the bill which were deemed

material by the court below present the following case:

On November 18, 1907, Central Counties Land Company, a corporation, was the owner of a certain 1120 acres of land in Lake County, California (Tr., p. 2).

On that day said corporation borrowed the sum of $24,570.75 from defendant Capay Ditch Company, and executed therefor three promissory notes which aggregated the said sum (Tr., pp. 5-7).

As security for the payment of said notes, said Central Counties Land Company executed and delivered to said Capay Ditch Company a mortgage, in form a deed absolute (Tr., p. 7), which deed declared upon its face that it was "made, executed and delivered in pursuance of a resolution of the Board of Directors of said Central Counties Land Co." (Tr., p. 11).

Said resolution so referred to is set forth in the bill, and provides for the "deposit *as security for the payment of the notes* the deed of this corporation" (Tr., p. 12), and authorized the president and secretary to execute the "deed as aforesaid . . . *and to deposit the same as security for the payment of said notes*" (Tr., pp. 12, 13).

The title of the said Central Counties Land Company to the said lands is now vested in plaintiff (Tr., p. 20).

On December 18, 1911, the mortgagee Capay Ditch Company executed a purported conveyance of the

lands in question to the Yolo County Consolidated Water Company (Tr., p. 17).

Thereafter defendant Yolo County Consolidated Water Company executed a purported conveyance thereof to defendants Stephens and Craig (Tr. 17).

Thereafter on December 20, 1911, defendants Craig and Stephens executed a purported conveyance thereof to Yolo Water and Power Company (Tr., p. 18).

Defendant Adamson, a tenant of Central Counties Land Company, was at all times in possession of the property and has never to this day surrendered up the same, but while still retaining the possession which he obtained under appellants grantor, has attempted to attorn to defendant Yolo Water and Power Company (Tr., pp. 18, 19).

All of the appellees above named took their purported conveyances with actual knowledge and notice of the character of the transaction (Tr., pp. 15, 16).

The prayer is, that the deed of November 18, 1907, be adjudged a mortgage; that an accounting of rents, issues and profits be had; that plaintiff be permitted to redeem; for possession of the lands, and for general relief (Tr., pp. 25, 26).

The foregoing allegations of the Bill deal with the mortgaged premises.

(b) *Allegations apparently overlooked by Court below.*—But these are not the only allegations. There are other allegations which deal with other real prop-

erty belonging to plaintiff, and these other allegations appear to have been overlooked by the Court below. It is alleged that in addition to the mortgaged premises plaintiff is the owner and in possession of a large portion of the frontage of Clear Lake; that defendant Yolo Water and Power Company threatens to erect a dam on the mortgaged premises; that unless restrained, it will do so and will not only cause a considerable portion of the mortgaged premises to be flooded, *but also will cause all of the said lands of which plaintiff is the owner and in possession to be flooded* (Tr., pp. 24, 25).

An injunction is asked against the construction of the dam and to prevent the flooding of plaintiff's land (Tr., p. 26).

The Court below took no notice of these facts in passing upon the motion to dismiss, unless they are covered in the opinion by the following excerpt:

> "A number of other averments of the complaint are omitted from this statement *because they have no bearing upon the question to be determined at this time*" (Tr., p. 34).

THE VIEWS OF THE COURT BELOW.

The learned Judge of the District Court discusses the question involved, in an opinion which will be found on pp. 32-35 of the Transcript. From this opinion it will be seen that he reached his conclusion that

the District Court was without jurisdiction for the reasons:

(1) That the jurisdiction is to be determined by Sec. 24 of the Judicial Code which went into effect January 1, 1912;

(2) That said section prohibits cognizance of suits by assignees of choses in action; and

(3) That this suit is upon a chose in action. In this regard the Court says:

> "It is strongly urged that this is not a suit upon a chose in action, but is a suit to quiet title. However the action may be denominated, it seems clear to me that what is sought here *is the enforcement of the original contract* between the Central Counties Land Company and the Capay Ditch Company, and the rights asserted are based wholly thereon.
>
> "The Court is asked to declare the instrument in the form of deed to be a mortgage, *and to do this because the parties agreed that it was such.* If it were not for this agreement, plaintiff would have no cause of action against defendants. This agreement is a chose in action, and this suit being to recover upon it, falls within the terms of Section 24, above quoted, and cannot be maintained.
>
> "The motion to dismiss will, therefore, be granted" (Tr., pp. 34-35).

We shall proceed respectfully to show that the Court below has in the foregoing passage fallen into an error which is readily demonstrable:

THE COURT ERRED IN ASSUMING THAT THE QUESTION OF JURISDICTION IS CONTROLLED BY SEC. 24 OF THE JUDICIAL CODE.

Section 24 of the Judicial Code (in effect January 1, 1912), declares that:

> "No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover on any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The language of this act is not quite the same as that of the Act of 1887. The difference consists in this: (1) The earlier act says "to recover the *contents* of any promissory note or other chose in action," where the later act merely says "to recover on any promissory note or other chose in action"; and (2) The earlier act says "to recover *the said contents,*" where the latter says "to recover upon said note or other chose in action."

We insist that these two acts employ the phrases "contents of a chose in action" and "chose in action" in the same sense and that the later statute is intended to be but a codification of the awkwardly expressed earlier act. It had been pointed out more than once by the United States Supreme Court that the words employed in the earlier acts "were not happily chosen" (*Shoecraft* v. *Bloxham,* 124 U. S., 735; *Plant Inv. Co.* v. *Jacksonville, etc. Ry. Co.,* 152 U. S., 76), and in codifying the act the changes were conse-

quently made, but were obviously not intended, we think, to alter the meaning, for the Judicial Code itself so declares in Sec. 294:

> "Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

If we are right in this contention then the error of the Court in treating the case as governed by the later act is of no material consequence. But if this phrase as used in the latest enactment has a broader meaning than as used in the earlier,—if it includes choses in action not contemplated by the latter,—then the error is of very considerable consequence; for the adjudged cases have given a fixed meaning to the phrase *"contents of a chose in action"* as used in the act of 1887-8, which, as we shall presently show, is conclusively favorable to appellant's contentions. Hence the discussion under this head is pertinent; for it will be noted that the mortgage, in form a deed which the Central Counties Land Company passed to defendant Capay Ditch Company, was executed on the 18th day of November, 1907; also that the purported conveyances of the mortgaged premises to the other defendants all took place in December, 1911. The cause of action, therefore, had accrued prior to January 1st, 1912, on which date the present section of the Judicial Code by its terms went into effect. The point is, that the

following clause found in the present act preserves the former act so far as plaintiff's right of action is concerned:

> "The repeal of existing laws . . . embraced in this act shall not affect . . . *any right accruing or accrued* or any suit or proceeding . . . But all such suits and proceedings *for causes arising or acts done prior to such date* may be *commenced* . . . within the same time and with the same effect as if said repeal . . . had not been made."
>
> *Judicial Code,* Sec. 299.

Interpreting the foregoing clause, the Federal Courts have said:

> "This section saves to the Federal Courts jurisdiction, not only of pending actions, but of causes of action which accrued prior to January 1st, 1912. *Lincoln* v. *Robinson* (D. C.), 194 Fed., 571; *Taylor* v. *Midland Valley R. Co.* (D. C.), 197 Fed., 323; *Dallyn* v. *Brady* (D. C.), 197 Fed., 494."
>
> *M'Kernan* v. *North River Ins. Co.,* 206 Fed., 984, 987.

> "What is now insisted upon by the motion to remand is, in effect, that the words 'causes arising or acts done prior to such date' shall be entirely eliminated, for no other effect can be given to these words except that causes which arose prior to January 1, 1912, although not yet sued on, still remain within the jurisdiction of the national courts, as if no change in the law had been made. If the intention of Congress by the enactment of § 299 had been merely to save suits then pending, is it not reasonable to suppose that similar language would have been used as in subdivision 20 of section 24, and the words 'shall not affect any right accruing or accrued,' and again, 'any act done or right accruing

or accrued before the taking effect of this act,' found in § 299, omitted?"

Wells v. *Russellville, etc. Co.,* 206 Fed., 528, 533.

See to like effect:

Dallyn v. *Brady,* 197 Fed., 494;
M. K. & T. Ry. Co. v. *Chappell,* 206 Fed., 688, 697;
Cady v. *Barnes,* 208 Fed., 361.

We conclude, therefore, that since the cause of action in the case at bar arose prior to January 1, 1912, the learned Judge was in error in holding that the question of jurisdiction is not to be measured by the phrase *"contents of a chose in action"* as used in the earlier act.

THE SUIT IS FOUNDED UPON THE TITLE TO REAL PROPERTY, AND THE COURT ERRED IN HOLDING THAT IT WAS BASED UPON A CHOSE IN ACTION.

The other error found in the opinion of the Court below is readily demonstrable:

(a) It is clear that a suit founded upon a conveyance of a title to land is not a suit by an assignee to "recover the contents of a chose in action," within the meaning of the Act of 1887-8.

"The contents of a contract as a chose in action in the sense of section 629 are the rights created *by it* in favor of

> a party in whose behalf *stipulations are made in it* which he has a right to enforce in a suit founded *on the contract;* . . . the obligation or promise contained in a contract is the contents when a suit is brought to enforce such obligation."
>
> *Corbin* v. *County of Black Hawk,* 105 U. S., 659, 665-6.

A deed possesses none of these elements. It conveys the title. The grantee sues a third person to protect that title. His right arises from his title. It is not based on any contract with the third person.

This distinction was early recognized by the United States Supreme Court. In a case where the law was such that the title to lands was passed to the mortgagee by the mortgage and the mortgagee sued a third person in ejectment, it was held that since plaintiff had the title, that was enough so far as the jurisdiction was concerned (*Smith* v. *Kernochan,* 7 How. (U. S.), 216).

Citing this last case as authority, the same Court said in *Deshler* v. *Dodge,* 16 How. (U. S.), 631:

> "The distinction, as it respects the application of the 11th section of the judiciary act to a suit concerning a *chose in action,* is this—where the suit is brought to enforce the contract, the assignee is disabled unless it might have been brought in the court, if no assignment had been made; but, if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in case of a like wrong in respect to any other sort of personal chattel.
>
> "The *principle* governing the case will be found in cases that have frequently been before us arising out of the assignment of mortgages, where it has been held, if the suit

is brought to recover the possession of the mortgaged premises, the assignee may bring the suit in the federal courts, if a citizen of a State other than that of the tenant in possession, whether the mortgagee could have maintained it or not, within this section; but, if brought to enforce the payment or collection of the debt by sale of the premises or by a decree against the mortgagor, then the assignee is disabled, unless the like suit could have been maintained by the mortgagee. 7 How., 198. This distinction is stated by Mr. Justice Grier, in the case of *Sheldon, et al.* v. *Sill,* 8 How., 441."

Deshler v. *Dodge, supra.*

"Upon the first question, it may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. . . . It has also been determined that the assignee of a *chose in action* may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors. And it has recently been very strongly argued that the restriction applies only to contracts 'which may be properly said to have contents'; 'not mere naked rights of action founded on some wrongful act, some neglect of duty to which the law attaches damages, but rights of action founded on contracts which contain within themselves some promise or duty to be performed.'

"*And this view of the restriction seems to be warranted* by the consideration of the mischief which it was intended to prevent."

Bushnell v. *Kennedy,* 9 Wall., 387, 391-2.

(b) Repeated decisions have excluded any possible idea that the rights created by the conveyance of an estate in land is to be deemed a chose in action.

Thus, in *Briggs* v. *French,* 4 Fed. Cas., 119, it is said:

"Now, the exception extends to promissory notes and choses in action. The present suit is not founded upon

either. It is founded upon a conveyance of a title to land, good (as far as appears) by the *lex loci situs* . . . The words, then, of the exception do not apply to the case. It is a case within the general descriptive words as to suitors, founding the jurisdiction of the circuit court."

Similarly, it was said in *Sheldon* v. *Sill,* 8 How. (U. S.), 449, 450:

"The only remaining inquiry is, whether the complainant in this case is the assignee of a 'chose in action' within the meaning of the statute. The term 'chose in action' is one of comprehensive import.

". . . It is true, *a deed of title for land does not come within this description.*"

In a case arising in Ohio, where the title passes under a mortgage, the Court said:

"A conveyance of land is not a chose in action.

". . . That the statute acts upon negotiable paper is clear. . . . *That it does not act on conveyances of real estate, either equitably or legally, would seem to be undoubted.*"

Dundas v. *Bowler,* 8 Fed. Cas., 28.

"The conveyance by the marshal under the receivership proceedings . . . can hardly be considered merely as an assignment of the original contract under which the plant was erected. *It was a conveyance of real estate.* . . . There does not seem to be any likeness in the case to that of the assignee of a promissory note or other chose in action."

Portage City Water Co. v. *City of Portage,* 102 Fed., 769, 774.

In a case arising in this Circuit it was said:

"It is now objected that the plaintiff is simply the assignee of a contract or contracts for the title to, or interest

in, real property; and, as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. . . .

". . . the bill alleges that since May 4, 1874, the plaintiff Gest, 'by a regular chain of conveyances and assignments,' has acquired 'all the right, title, and interest' which Rice and Clark, Layton & Co. then had in said property, or the rents, issues and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrongfully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title and interest of Rice and Clark, Layton & Co. therein, *is the sale and conveyance of the beneficial interest in the property, and not the mere assignment of a right of action thereabout.*"

Gest v. *Packwood,* 39 Fed., 525, 537.

We thus have early declarations, both by the United States Supreme Court and by the United States Circuit Courts, to the effect that actions founded upon conveyances of land are not suits to recover upon a chose in action within the meaning of said acts. Indeed, no one seems ever before to have doubted it. The Federal Courts have taken jurisdiction of hundreds of suits brought by grantees under deeds in which the grantor could never have maintained the suit if the conveyance to him of the title was to be regarded as a chose in action, or if he himself were to be regarded as the assignee of a chose in action. In many of these cases the question of jurisdiction was directly raised, the ground assigned being that the conveyance was merely colorable and that it did not therefore in reality transfer the title. It has been re-

peatedly held by the Courts that if the title really passed by the conveyance, then if the requisite citizenship existed, the Federal Courts would have jurisdiction although they would not have had jurisdiction had the title remained in the grantor.

The following authorities will sufficiently illustrate this proposition:

> "The bill states the complainant to be a citizen and resident of the State of Alabama, and the defendants to be citizens and residents of the State of Ohio. It has not been alleged, and certainly cannot be alleged, that a citizen of one State having title to lands in another, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the State in which the lands lie; consequently, the single inquiry must be whether the conveyance from M'Arthur to M'Donald was real or fictitious?"

M'Donald v. *Smalley,* 1 Peters, 623.

> "The subject of colorable transfers to create a case for the jurisdiction of the courts of the United States was presented for the most part in suits for the recovery of real property, when a conveyance had been made by a citizen of the State in which the suit must be brought to a citizen of another State. . . . And upon the question of transfer it was uniformly held that, *if the transaction was real and actually conveyed to the assignee or grantee all the title and interest of the assignor or grantor in the thing assigned or granted,* it was a matter of no importance that the assignee or the grantee could sue in the courts of the United States when his assignor or grantor could not."

Farmington v. *Pillsbury,* 114 U. S., 138, 143.

See also *Lehigh Mining & Mfg. Co.* v. *Kelley,* 160 U. S., 327, where many cases are reviewed.

There can be no doubt, therefore, that if, as appel-

lant alleges and the demurrer admits, the Central Counties Land Company formerly owned these lands, and its title thereto has become vested in plaintiff by mesne conveyances, plaintiff is entitled to bring an action in the Federal Courts to remove any cloud that may exist upon its title. It happens here that the cloud is a mortgage. The fact that the mortgage took the form of a deed absolute, does not affect the case unless it be to make the cloud a more serious one. The suit is not brought upon an agreement that no title should pass to the mortgagee. *It is brought, because by mandate of express law, no title did or could pass to the mortgagee under the circumstances.*

That this action, under the system prevailing in California, is to be treated as a suit to remove a cloud from title will be further emphasized a little later on in this brief. First we wish to point out that:

(c.) The learned court below misconceived the nature of the action.

As we have seen in the paragraph already quoted herein from his opinion, the learned Judge of the District Court conceived that the appellant seeks "the enforcement of the original contract" between the mortgagor and the mortgagee; and that "the Court is asked to declare the instrument in form a deed to be a mortgage . . . *because the parties agreed it was such.*"

With much respect, we submit that this is an entire misconception of appellant's case.

The learned trial Judge seems to have overlooked the fact that in all mortgages words are used which, but for the *law,* would pass the title. Their *form* is that of a conveyance. Prior to the statute the identical language now ordinarily used passed the title (*Savings & Loan Society* v. *McKoon,* 120 Cal., 179).

But whenever the fact appears that the instrument is given merely as security, *the law*—not the agreement of the parties—steps in and cuts down *the meaning of the terms used,* and prevents them from carrying the estate which the terms of the instrument would otherwise carry. *And there is no difference whatever in this respect whether the mortgage is in the usual form or in the form of a deed absolute (Brandt* v. *Thompson,* 91 Cal., 461).

The bill alleges certain facts, viz.:

(1) The borrowing of the money from Capay Ditch Company and the giving of promissory notes therefor (Tr., pp. 5-7); and

(2) The contemporaneous execution by the Central Counties Land Company, "solely for the purpose of securing the payment of said promissory notes," of an instrument in writing in form a deed, but intended as a mortgage (Tr., p. 7).

There is no allegation anywhere in the bill that the parties ever agreed that the instrument should be a

mortgage. The learned Judge is wholly in error in this particular. The allegation is, that the Central Counties Land Company, solely for the purpose of securing the notes, executed a deed in form but intended as a mortgage. There is no allegation that defendant agreed that it should be such. The essential allegation is that the deed was given solely for the purpose of securing the notes. The law would then stamp it as a mortgage, whether so intended or not.

The theory of the complaint is this:

The Civil Code of California declares:

> "Sec. 2924. Every transfer of an interest in property other than in trust, made only as security for the performance of another act, is to be deemed a mortgage."

As already pointed out, the deed here in question is alleged to have been executed "solely for the purpose of securing the payment of the notes." It is therefore "to be deemed a mortgage."

The Supreme Court of California, construing the said section, has said:

> "If the deed was intended merely as a security for the payment of a debt, *it is a mortgage, 'no matter how strong the language of the deed or any instrument accompanying it might be.'* (*Woods* v. *Jansen,* 130 Cal., 200)."

Todd v. *Todd,* 164 Cal., 255.

See also:

Moisant v. *McPhee,* 92 Cal., 76;
Smith v. *Smith,* 80 Cal., 325.

Whenever the fact is that a deed absolute is given merely as security for a debt, the law fixes its character, and *the policy of the law is such that it will not permit the parties to contract that any title shall pass by the instrument.* This is not only clear from the foregoing quotation but the Civil Code expressly declares that:

> "Sec. 2888. *Notwithstanding an agreement to the contrary,* a lien, or a contract for a lien, *transfers no title to the property* subject to the lien."

And the Code of Civil Procedure contains the following provision:

> "Sec. 744. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

The effect of sections 2924 and 2888 of the Civil Code, as regards the passage of title is summed up in the following quotation:

> "It cannot be doubted that the deed to the bank was simply a mortgage and vested it with nothing more than a mortgage lien. 'Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage,' except in cases of pledges of personal property. Section 2924, Civil Code. 'Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien.' Section 2888, Civil Code."

Shirey v. *All Night and Day Bank,* 166 Cal., 50, 54.

The foregoing discussion has brought us to see that however strong the terms of the deed may be thought to be, no title passed thereunder to the grantee named therein. The only operative effect of the instrument was to create a lien. It is alleged as a fact that the instrument was executed solely as security for the notes—and indeed, the very resolution which authorized the President and Secretary to execute the deed is set forth in the bill, and this shows that they were to execute the instrument merely as security for the notes. From these allegations it follows as a matter, *not of contract but of law,* that no title passed by the deed. Upon this state of facts the law fixed the rights of the parties. If notwithstanding the existence of said facts, the parties had tried to agree that title should nevertheless pass, the agreement would have been void—and neither an action nor a defense could be grounded upon it.

The law gave the plaintiff all the rights it has. Even if the grantee named had expressly agreed that the grantor should have a right to a reconveyance, that would have added no new right or obligation that the law did not already impose.

> *Breitenbücher* v. *Oppenheim,* 160 Cal., 98, 102;
> *Bayles* v. *Baxter,* 22 Cal., 575, 578-9.

The learned Judge mistakenly says that "the Court is asked to declare the deed to be a mortgage *because the parties have agreed that it should be a mortgage";*

while the fact is that the bill asks that the deed be adjudged a mortgage because the law makes it a mortgage. It alleges that the borrowing corporation authorized its President and Secretary to execute this deed as security for the notes and that the instrument was delivered solely for that purpose. Upon these facts the law gives to the instrument its character as a mortgage—and it makes not the least difference what the mortgagee may have thought about it. If he agreed that it was a mortgage (the bill contains no such allegation), he merely agreed to what the law had already declared the instrument to be.

If, on the contrary, both parties had agreed that although security for the loan, it should be a deed and convey the title, such agreement would have been void and would not have altered the character of the transaction (see Civil Code, Sec. 2889), and it would have been a mortgage nevertheless.

THIS ACTION IS TO BE DEEMED AN ACTION TO REMOVE A CLOUD FROM TITLE, NOT TO RECOVER ON A CHOSE IN ACTION.

In the case at bar all of the promissory notes secured by the deed, were dated November 12, 1907, and were due and payable August 1, 1908. The lien created by the deed was therefore extinguished four years later; that is to say, on August 1, 1912, by lapse

of time. This results from Sec. 2911 of the Civil Code, which declares:

> "Sec. 2911. A lien is extinguished by the lapse of time within which under the provisions of the Code of Civil Procedure an action can be brought upon the principal obligation."

In *Raynor* v. *Drew,* 72 Cal., 308, a case identical with the case at bar was presented. The action was brought pursuant to section 346 of the Code of Civil Procedure to "redeem" a mortgage. The Court said:

> "On May 14, 1875, the plaintiff gave to the defendant an instrument in writing, which in form was an absolute deed. It is admitted by the pleading that this instrument was to secure the payment of a promissory note; and therefore it was a mortgage, and under the present doctrine, did not convey the title (*Taylor* v. *McLain,* 64 Cal., 514; *Healy* v. *O'Brien,* 66 Cal., 519), and did not give a right of possession. (Civ. Code, sec. 2927.)"
>
> ". . . If the title and right of possession remain in the mortgagor, and the lien of the mortgage is extinguished by lapse of time (Civ. Code, sec. 2911), what is it that the mortgagee has which can be redeemed? The old phraseology has come down to us, and found a place in the statute. **But it is manifest that an action to 'redeem' under these circumstances is in effect under our system merely an action to remove a cloud.** And since a court of equity may require justice to be done as a condition of removing the cloud, why should there be any period of limitation for such an action?"

In *Baker* v. *Fireman's Fund Ins. Co.,* 79 Cal., 34, 42, the Court uses this language:

> "As said heretofore by the Appellate Court, this action to redeem is in effect **merely an action to remove a cloud from the title.**"

Hall v. *Arnott,* 80 Cal., 348, 354, also presents a case where a deed absolute in form was given as security and the statute of limitations had run on the debt. The Court expressed itself as follows:

> "The lien created by the instrument having been thus nullified and extinguished, and the leading title and right of possession having remained in the mortgagor, it may be said that there is nothing to redeem. **But the instrument, being a deed absolute in form, constitutes a cloud upon whatever interest the grantor may have had in the property therein described at the time it was executed,** or that he or his successors in interest may have subsequently acquired. The plaintiff **is in equity entitled to have such cloud removed** upon doing equity, in paying the remainder due upon the decree of foreclosure in *Arnot* v. *Waterhouse.* (*Raynor* v. *Drew, supra*; and *Booth* v. *Hoskins, supra; Cazara* v. *Orena,* 80 Cal., 132.)"

These authorities, we submit, make it clear beyond doubt that this action to redeem is not to be classed with suits to recover upon a chose in action. This suit is grounded upon plaintiff's title. The defendant once had a lien on the real property which has become extinguished by lapse of time. That lien was created by an instrument in form a deed absolute, and it constitutes a cloud upon plaintiff's title.

THE INSTRUMENT IS ON ITS FACE A MORTGAGE.

While we think further discussion unnecessary, there is another fact which perhaps should be brought to the Court's attention. Thus far we have assumed that the instrument is upon its face a deed. But this concedes too much. In form, the instrument is that

of a grant, bargain and sale deed, until we come to the paragraph which precedes the witness clause. This declares that it is "made, executed and delivered in pursuance of a resolution of the Board of Directors of the Central Counties Land Company." The act is the act of a corporation—not of a private individual. Express reference is made to the resolution in the deed, and said resolution is thereby incorporated into the instrument, and this shows on its face that the deed was to be given as security only.

Anyone in taking such an instrument from the corporation, even where the resolution is not expressly referred to, is bound to look to the authority of the officers who sign the instrument (*Vaca Valley R. R. Co.* v. *Mansfield,* 84 Cal., 566).

We have, therefore, a case where the instrument and the resolution referred to in the instrument must be read together, and when we do this, we have a mortgage—not because parol evidence *dehors* the instrument establishes it to be such, but because the fact appears from the two instruments when read together.

Viewed from this standpoint, the action comes to this: Appellant owns the property. There is an outstanding mortgage on it, the lien of which has been extinguished by lapse of time, and he sues to remove the mortgage as a cloud upon his title, offering to do equity by paying whatever is unpaid on the mortgage,

regardless of the statute of limitations. Such suit cannot, of course, be said to be brought by an assignee to recover upon a chose in action.

THE JURISDICTION ATTACHES REGARDLESS OF THE MORTGAGE QUESTION, BECAUSE OF OTHER INDEPENDENT ALLEGATIONS IN THE BILL.

There is yet another reason for a reversal of the decree appealed from.

As pointed out in the statement of facts with which this discussion is opened, the bill here contains the following allegations:

XXV

"That the defendant Yolo Water and Power Company threatens to and will, unless restrained by this Honorable Court, proceed to construct, and will construct, a dam upon the real property hereinabove described, and will construct controlling works thereon, and will cause a considerable portion of the said lands to be flooded.

XXVI

"That plaintiff is the owner and in possession of a large portion of the frontage of said Clear Lake, and that if such dam is built the waters of said lake will thereby be raised and impounded, and all of the lands of plaintiff along said lake frontage will be flooded" (Tr., pp. 24, 25).

These allegations are coupled with a prayer that the defendant "be restrained and forever enjoined " from erecting or constructing any dam, or portion " of a dam, or flumes, or ditches or controlling works, " upon the said real property described in this Bill,

"or upon any part or portion thereof, or from flood-
"ing any part or portion of the said lands, or any
"other lands belonging to plaintiff" (Tr., pp. 25-26).

These allegations present the case of an owner of a large amount of real property, some of which is mortgaged, suing to enjoin the erection of a dam upon the mortgaged premises and the flooding of the said mortgaged premises and other lands belonging to the mortgagee. This in itself, together with the allegations of diverse citizenship, brings the case within the Federal jurisdiction.

But this is not all. The bill further alleges that defendant Adamson was the tenant of plaintiff's predecessor in interest; that he has never surrendered up the possession of the mortgaged premises; that he has attempted to attorn to the defendant Yolo Water and Power Company, and now claims to be in possession of the property as the tenant of the said defendant Yolo Water and Power Company and claims to have paid the rental to said defendant (Tr., pp. 18, 19 and 20).

Plaintiff prays to be let into the possession of the property; an accounting is asked, and general relief also is prayed for. These allegations also, we submit, make out a case within the jurisdiction.

So on that ground also the jurisdiction should have been retained.

It is to be noted that if the District Court has jurisdiction to accord preventive relief to protect plaintiff's other lands and to prevent waste or injury to the mortgaged premises, the controversy will draw to it the matter of the redemption from the mortgage, even if the latter standing alone would not come within the jurisdiction. This is pointed out in *Howe & Davidson* v. *Haugan,* 140 Fed., 182, 184, where the following is said:

> "The remaining ground of objection is that the court is without jurisdiction 'in respect to any of the water leases or contracts except the one option contract made directly with the complainant.' This objection rests upon the statutory limitation against suit by the assignee of a *chose in action* for its enforcement unless suable as well by the assignor in the Federal court, and upon the authorities holding bills for specific performance of contracts to be within such limitation. If it be assumed, however, that the rights derived through Mr. Clark are choses in action, and cannot confer jurisdiction, nevertheless the presentation of the jurisdictional cause—as thus rightly conceded to appear—*would have the right to Federal jurisdiction, and bring within equitable cognizance all the other matters referred to as branches of the controversy, saving multiplicity of suits. The statute is not then applicable when jurisdiction attaches for such cause well stated.*"

This, of course, is but an application of a general principle (*Pomeroy's Equity Jurisprudence,* Vol. 1, Sec. 181).

For each and all of the foregoing reasons appellant respectfully submits that the decree dismissing the bill

for want of jurisdiction was erroneous and should be reversed.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff and Appellant.

HARDING & MONROE,
Of Counsel.